United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

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74-2598

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2598

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL REID and THEODORE E. THOMAS, JR.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING

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Preliminary Statement

The United States of America respectfully petitions for rehearing of the decision by this Court, filed April 24, 1975, insofar as the decision held that the Court lacked the power to remand for resentencing following the dismissal of Count Two, based on Title 18, United States Code, Section 2114 and the vacating of the 25-year sentences imposed upon the appellants. Slip Op. 3080.

Reasons For This Petition

In dismissing and vacating Count Two, charging a violation of Title 18, United States Code, Section 2114, on which the District Court had imposed 25-year sentences on Daniel Reid and Theodore E. Thomas, Jr., this Court recognized that the District Court had chosen Count Two "as

the vehicle for [its] heaviest sentence and might well have imposed higher sentences on other counts if [it] had known the conviction on Count Two was invalid" (Slip. Op. at 3080). The Court further concluded that this windfall to each defendant—which resulted in a reduction of sentence from 25 years to six years in the case of Reid and to eight years in the case of Thomas—was "beyond our power to remedy" (Slip. Op. at 3080).

However, here Reid and Thomas received multiple sentences for the assault and wounding of Agent Patrick Shea of the Drug Enforcement Administration and the robbery of Shea's Government-issued revolver and they had both taken appeals from their convictions on Counts Two and Four (see Section IV of the Court's Opinion; Reid Br. 8-16, 21; Thomas Br. 32 (including Point IV)). Since the sentences under Counts Two and Four were illegal as of the time that they were imposed and since, in any event, the appellants appealed from their convictions on all of the counts involved, this Court, in the interests of justice, has the power to vacate the sentences imposed on these counts and to remand the case for resentencing *de novo*, up to the maximum term authorized by Section 2112, on Counts Two and Four in order to ascertain the District Court's intention. *Natarelli* v. *United States*, Dkt. No. 74-2667 (2d Cir. May 14, 1975), Slip. Op. pp. 3534-3536; *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972) (*per curiam*); *United States* v. *Corson*, 449 F.2d 544, 551 (3rd Cir. 1971) (*en banc*); *United States* v. *Shelton*, 465 F.2d 361, 363 (4th Cir. 1972). Such a remand is clearly appropriate to prevent the perpetrators of these violent crimes from reaping an unjustified windfall. Compare *Bozza* v. *United States*, 330 U.S. 160, 166-67 (1947).

ARGUMENT*

The Court should remand for resentencing under Section 2112 of Title 18, United States Code.

We respectfully submit that this Court erred in concluding that it lacked the power to remand for resentencing in the case at bar (Slip Op. 3080). By reason of the fact that, at the time of sentence, the lower court was acting under an erroneous impression of the validity of Count Two and, as this Court recognized, adopted that Count as the vehicle for its heaviest sentence, a remand for resentence to ascertain the District Court's intention is manifestly in the interest of justice.

I

The offenses charged in Counts Two (assault and wounding of Agent Shea during the robbery of Shea's Government-issued revolver, Title 18, United States Code, Section 2114), and Four (robbery of property of the United States, namely the revolver, Title 18, United States Code, Section 2112), arose out of the same events that occurred on August 1, 1974 when Agent Shea had intervened to stop the hold-up of a Bronx liquor store during the course of which the liquor store proprietor had been stabbed repeatedly with an ice pick. On these counts, Reid and Thomas were sentenced as follows:

Count	*Reid* (*in years*)	*Thomas* (*in years*)
2	25	25
4	3	3

Reid and Thomas each appealed from their convictions on each of these counts. The Court affirmed the convictions below except that the conviction on Count Two, under Title 18, United States Code, Section 2114, on which a 25-year

* The facts of the case are fully set forth in this Court's opinion.

sentence had been imposed, was reversed on account of the lack of a postal nexus. This Court concluded that it lacked the power to remand the remainder of the case for resentencing (Slip Op. 3080), but did not cite any authority for this proposition.

Under the state of the law as the District Court believed it to be, the sentences on Counts Two (§ 2114) and Four (§ 2112) were illegal when imposed because Count Four was nothing more than a lesser included offense charged in Count Two. Count Two charged a robbery of United States property from Agent Shea accompanied by the aggravating factor of an assault and wounding in furtherance of the robbery. Count Four charged simply a robbery of Government property from Agent Shea. The property stolen—as charged in both counts—was Agent Shea's revolver. Under these circumstances, the convictions on Counts Two and Four merged, the latter being a lesser included offense of the former.

This is made clear by *United States* v. *Hanahan,* 442 F.2d 649 (7th Cir. 1971), *vacated and remanded for reconsideration in light of Solicitor General's position,* 414 U.S. 807 (1973). *Hanahan* involved an armed robbery of an Internal Revenue Service office charged as a violation of Title 18, United States Code, Section 2114. Upon conviction, Hanahan was sentenced to a mandatory term of imprisonment of twenty-five years. In the Supreme Court, the Solicitor General took the position that Section 2114 applied only to postal-related crimes. The Solicitor General went on to point out that all the elements of a robbery charge under Section 2112 had been made out by the conviction under Section 2114, where a completed robbery is involved. The Solicitor General urged that the case be remanded for resentencing under Section 2112. The Supreme Court in *Hanahan* remanded the case for reconsideration in the light of the Solicitor General's position. 414 U.S. 807 (1973). In *United States* v. *Rivera,* 513 F.2d 519, 532 (2d

Cir. 1975) this Court approved the position taken by the Solicitor General on a remand for resentencing. *Cf. Ekberg* v. *United States,* 167 F.2d 380, 385 (1st Cir. 1948).

Since, as the District Court viewed the law, the conviction on Section 2112 in this case was no more than a conviction on a lesser included offense of Section 2114, it seems clear that a general sentence on Counts Two and Four should have been imposed at the time of the initial sentencing. For example, in *United States* v. *Corson,* 449 F.2d 544 (3rd Cir. 1971) (*en banc*), the defendant was convicted on three counts based upon a single armed robbery of a bank. The defendant received sentences of ten years for entering a bank with intent to commit a felony under Title 18, United States Code, Section 2113(a); five years, to run consecutively with the first sentence, for bank robbery under Title 18, United States Code, Section 2113(a); and probation, to be served following expiration of the five year sentence, for bank robbery attended by jeopardizing life with a dangerous weapon, under Title 18, United States Code, Section 2113(d)—the most aggravated offense charged. Corson later filed a Rule 35 motion to vacate his prison terms, claiming that, since the § 2113(d) count charged the most aggravated offense, the lesser offenses merged into that count and ceased to exist as separate, punishable offenses. The District Court vacated the sentences on Counts 2 and 3, in the light of the Supreme Court's decision in *Prince* v. *United States,* 352 U.S. 322 (1957), holding that it was not the intention of Congress, in establishing a series of greater and lesser penalties under the bank robbery statute, to pyramid the penalties thereunder. The Third Circuit remanded the case for resentencing for a term not to exceed ten years, holding that the District Court erroneously had imposed separate sentences on *all three counts.*

The *Corson* Court recognized:

> "It is impossible to say that certain of these sentences rather than others were 'illegal' under Rule 35. Rather, it was the *cumulation* of sentences, *the sentencing in its entirety* which was 'illegal.' It was therefore error for the district court merely to have vacated the sentences on Counts II and III and to have left standing the sentence on Count I. Thus, all the sentences originally imposed were invalid and ought to have been vacated in their entirety, so that the appellant could then be resentenced." 449 F.2d at 551 (emphasis in original).

In a footnote, the *Corson* Court pointed out that the remedy of resentencing is expressly required by *Prince* v. *United States, supra,* 352 U.S. at 329, and also cited *United States* v. *Parker,* 442 F.2d 779 (D.C. Cir. 1971) and *Bryant* v. *United States,* 417 F.2d 555 (D.C. Cir. 1969), *cert. denied,* 402 U.S. 932 (1971). 449 F.2d at 551 n. 16.

In *Gorman* v. *United States,* 456 F.2d 1258 (2d Cir. 1972), this Court expressly approved the approach adopted in *Corson,* even in cases in which sentences imposed on separate counts were concurrent. More significantly, however, in *Gorman,* 456 F.2d at 1259 n. 1, this Court pointed out that if on appeal from a general sentence on multiple convictions arising from a single bank robbery, one or more counts were reversed, then a remand for resentencing would be necessary if the counts remaining did not authorize a term of imprisonment as lengthy as imposed under authority of the count or counts reversed on appeal. On the peculiar facts of *Gorman,* the Court found a remand to be a meaningless gesture. See also *United States* v. *Oliver,* Dkt. No. 74-2412 (2d Cir. June 17, 1975) Slip Op.; *United States* v. *Pravato,* 505 F.2d 703, 705 (2d Cir. 1975).

The principle announced in *Corson* and adopted in this Circuit in *Gorman* has not been limited in its application simply to those cases brought under the various orderly

subsections of the Federal Bank Robbery Act. The same treatment is warranted also in situations where convictions are merely duplications. In *Natarelli* v. *United States,* Dkt. No. 74-2667 (2d Cir. May 14, 1975), the defendant had been convicted of conspiracy to interfere with commerce by threats or violence in violation of Title 18, United States Code, Section 1951, and conspiracy to transport stolen property in violation of Title 18, United States Code, Section 371. Concurrent sentences of twenty years and five years had been imposed. On a Section 2255 application, this Court held that separate sentences on two conspiracy counts could not be imposed since only a single conspiracy was involved as a matter of law. Thereupon, noting that ". . . both convictions could stand under a single general sentence," the Court remanded the case for resentencing, holding that:

> "Since it was the sentencing itself that was illegal, *United States* v. *Corson, supra,* 449 F.2d at 551, since the error was not cured by the existence of concurrent sentences, *United States* v. *Mori,* 444 F.2d 240, 245 (5th Cir.), *cert. denied,* 404 U.S. 913 (1971), and since we cannot pin down the sentencing court's intention with sufficient certainty, the most suitable remedy is to remand the case with directions to the district court to vacate the sentences and to resentence Natarelli. . . ." Slip Op. pp. 3535-36.

The rationale of *Corson, Gorman* and *Natarelli* is fully applicable here. Since it seems clear that Congress cannot have intended that a defendant be punished for violation of Section 2114 for a completed robbery involving an assault and wounding and for violation of Section 2112 for a completed robbery, the trial judge should, on his view of the law, have imposed a general sentence on Counts Two and Four of twenty-five years imprisonment, as required by Section 2114. Since Section 2114 has subsequently been held inapplicable because the offense proven under Count

Two had no postal nexus, the case should nonetheless be remanded for a resentence on Count Four, as *Gorman* v. *United States, supra,* 456 F.2d at 1259 n.1 requires, for a term of imprisonment not exceeding the maximum term permissible under Section 2112—fifteen years imprisonment.

Similarly, as a result of this Court's action on appeal, the conviction under Section 2114 should now, under *Hanahan* and *Rivera,* be recast as a Section 2112 conviction. While to do so would result in two convictions under Section 2112 arising out of precisely the same conduct, *Natarelli* makes clear that the proper course of action in cases of such duplicity of convictions is a remand for resentencing, not the dismissal of one of the duplicitous counts as this Court appears to have thought necessary in this case.

A remand under either theory would, of course, violate no right of the defendants under the Double Jeopardy or Due Process Clauses of the Constitution. *United States ex rel. Ferrari* v. *Henderson,* 474 F.2d 510 (2d Cir.), *cert. denied,* 414 U.S. 843 (1973).

II

Quite apart from the fact that as charged, proven and submitted to the jury in this case Count Four was a lesser included offense of Count Two, we respectfully submit that a remand for resentencing would be, in any event, an appropriate action by the Court.

The practice of remand for resentencing following a reversal on one count of a multi-count conviction is a usual and customary practice in this Court. *See, e.g., United States* v. *Houle,* 490 F.2d 167, 172 (2d Cir. 1973), *cert. denied,* 417 U.S. 970 (1974); *United States* v. *DeMarco,* 488 F.2d 828, 833 (2d Cir. 1973); *United States* v. *Mancuso,* 485 F.2d 275 (2d Cir. 1973). While these cases involve a remand for resentencing on the theory that, with one or more counts dismissed, the District Court might wish to reduce the sentence, this Court, with the entire case before

it, has the power to remand for any purpose, including a sentencing *de novo* up to the statutory maximum of Section 2112, unless a remand for such a purpose would violate the Constitution. Title 28, United States Code, Section 2106. *Cf. Bryan* v. *United States,* 338 U.S. 552 (1950).

In *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), the Supreme Court held that, following a successful appeal from conviction, neither the Double Jeopardy Clause nor the Due Process Clause of the Constitution imposes an absolute bar to a more severe sentence. See also *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973); *United States* v. *Coke,* 404 F.2d 836, 839-841 (2d Cir. 1968) (*en banc*). In *Allison* v. *United States,* 409 F.2d 445 (D.C. Cir. 1969), the Court of Appeals analyzed the impact of the Double Jeopardy Clause on the power of an appellate court to remand for resentencing following a successful appeal. Allison had been convicted of assault with intent to commit carnal knowledge but was acquitted by the jury on account of a faulty jury instruction —of the lesser included offense of taking indecent liberties with a minor child. The conviction on assault with intent to commit carnal knowledge was reversed on appeal for failure of the necessary corroboration. Despite the jury's acquittal for taking indecent liberties with a minor child, the Court of Appeals remanded for the entry of a judgment of conviction and sentence for that crime, rejecting Allison's facially compelling double jeopardy claim, 409 F.2d at 452:

> "This disposition is plainly in the interest of justice; the verdict of acquittal did not reflect a finding of fact in defendant's favor, but an (inaccurate) legal supposition that the conviction of defendant for his carnal knowledge intent necessarily carried as a corollary a verdict negativing indecent liberties intent. *In appealing to this court for correction of errors of law, including the error of the trial judge in presenting carnal knowledge to the jury, defendant submits himself to a rectification that puts him in the position he was entitled to occupy at trial.* Appellant stands in the same legal position as one

> who had been found guilty only of carnal knowledge." (emphasis supplied)

The principles of *Allison* apply here, particularly since here there was no acquittal by the jury in the Court below on any count. *United States* v. *Sacco*, 367 F.2d 368 (2d Cir. 1966) (Lumbard, Ch.J., *dissenting*), *United States* v. *Chiarella*, 214 F.2d 838 (2d Cir.), (Harlan, C.J. *dissenting*), *cert. denied*, 348 U.S. 902 (1954), and *Miller* v. *United States*, 147 F.2d 372 (2d Cir. 1945), are not to the contrary. None of these cases, unlike *Allison* and this case, arose in the context of a direct appeal from a conviction. *Miller*, which arose on collateral attack, involved pyramided sentences under the Federal Bank Robbery Act, and even assuming its applicability to this case, its authority has been undermined by this Court's subsequent decision in *Gorman* v. *Untied States*, *supra*. *United States* v. *Sacco*, *supra*, arose in a wholly distinct context from that presented by this case* and, in addition, relies substantially on *Miller*, which seems no longer to be good law in this Circuit after *Gorman*. *United States* v. *Chiarella*, *supra*, arose on collateral attack. While uniquely among the cases from this Circuit cited above, *Chiarella* involved a partial reversal on appeal and resentence, nothing in *Chiarella* holds that this Court lacks the power here to remand for resentencing. Moreover, *Chiarella* chose to distinguish, rather than reject, *Kitt* v. *United States*, 138 F.2d 842 (4th Cir. 1943), which this Court recognized in *United States* v. *Sacco*, *supra*, 367 F.2d at 369 n.1, may be properly read to authorize the remand for which we contend in Part I of this petition. In addition, the result in *Chiarella* appears to have been dictated by the simple affirmance on appeal of the

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* As this Court noted in *United States* v. *Barash*, 428 F.2d 328, 332 n.3 (2d Cir. 1970):

> "*Sacco* had nothing to do with a trial, an appeal, reversal and remand for new trial, and sentence after retrial."

counts upon which a greater sentence was found to have been imposed when the case returned to the District Court, a situation the Government apparently made no attempt to alter in the way presently pursued.

More fundamentally, nothing in *Ex Parte Lange,* 18 Wall. 163 (1873) and *United States* v. *Benz,* 282 U.S. 304 (1931), on which *Sacco* and *Chiarella* rely, preclude the relief the Government seeks here. *Benz* merely held that a District Court has the power to reduce sentence during the term of count when imposed. *Ex Parte Lange* contains broad language which, when read in the context of the record in that case, is not controlling here. In *Lange,* the defendant had been sentenced to a fine *and* imprisonment under a statute authorizing only a fine or imprisonment and had already paid his fine in full at the time that he sought release from the additional sentence of imprisonment imposed on his conviction. Service of the sentence of imprisonment was held barred by the Double Jeopardy Clause. The principle in *Lange* was long ago explained and distinguished in *Murphy* v. *Massachusetts,* 177 U.S. 155, 160 (1900):

> "It was held that it was a fundamental principle that no man could be twice punished by judicial judgments for the same offense, and that when a judgment had been executed by full satisfaction of one of the alternative penalties of the law, the court could not change the judgment so as to impose another. The present case does not fall within that decision, for here an erroneous judgment was vacated on the application of the accused; the original sentence had not been fully satisfied; and the second sentence was rendered in pursuance of the applicable statute." See also *Bozza* v. *United States, supra,* 330 U.S. at 167 n. 2 (1947); *United States* v. *Barash,* 434 F.2d 358 (2d Cir. 1970), *cert. denied,* 401 U.S. 938 (1971).

Ex Parte Lange is further distinguishable in that, viewing the sentence imposed as a whole, a remand for resentencing —either on Count Two or Count Four—will not result in any increase in the total sentence imposed, for under no circumstances can the sentence be increased beyond the statutory maximum of fifteen years under Section 2112, in contrast to the twenty-five years originally imposed on Count Two.*

Lange is thus plainly inapposite to the facts of this case which more nearly approach the circumstances discussed in *Bozza* v. *United States, supra,* 330 U.S. at 165-67 (1947). In *Bozza*, as here and in *Lange,* the defendant had already commenced service of his sentence. The trial judge, a few hours after the defendant was remanded, recalled him and increased his sentence to conform to the statutory minimum. Bozza contended in the Supreme Court that under *Lange* his sentence could not be increased once he had begun to serve it. The Court rejected the claim on the ground that a sentence not conforming to statute may always be corrected, a ground relevant only to the argument in Point I hereof. In doing so, however, the Court made clear that sentencing was not a game and that a defendant was not entitled to the benefit of errors by the Court on sentencing. Similar considerations are relevant here and should be controlling, particularly in view of this Court's express suggestion that the reversal on Count Two has probably resulted in a sentence which does not embody the intentions of the District Court.

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* Similar considerations dispose of any contention that a resentence to a greater term under Section 2112 than that initially imposed are foreclosed under *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). See *United States* v. *Corson, supra.*

CONCLUSION

The case should be remanded for resentencing under Section 2112 of Title 18, United States Code.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEVEN A. SCHATTEN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of June, 1975 he served a copy of the within Petition for Rehearing by placing the same in a properly postpaid franked envelope addressed:

E. Thomas Boyle, Esq.
The Legal Aid Society
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And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Steven A Schatten

STEVEN A. SCHATTEN

Sworn to before me this

23rd day of June, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977